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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

ARTHUR M. HAWKINS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the inquiry for determining proper venue set forth in *United States v. Rodriguez-Moreno* requires that the "nature of the crime charged" be determined solely by the "essential conduct elements" of the offense, with venue proper only in districts where that "essential conduct occurs."

2. Whether venue may be properly based on the effects of a defendant's conduct in a district other than the district in which the acts constituting the offense are committed.

THE PARTIES

The caption in this case contains the name of all parties.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REFERENCE TO OPINIONS DELIVERED BELOW

1. The Seventh Circuit affirmed the District Court's finding in its opinion of August 14, 2003. (See Appendix A).

2. A Petition for Rehearing/ Rehearing En Banc was filed and a subsequent denial of consideration issued on October 10, 2003 and amended on October 14, 2003. (See Appendix B).

JURISDICTION

On August 14, 2003, the United States Court of Appeals for the Seventh Circuit affirmed the Judgment of the United States District Court Order of the United States District Court for the Southern District of Illinois and is reported at 340 F.3d 459. On October 10, 2003, the United States Court of Appeals denied the Petition for Rehearing/Rehearing En Banc amending that order on October 14, 2003 and is reported at 2003 U.S. App. LEXIS 20841 and 2003 U.S. App. LEXIS 21059..

A request for an extension of time within which to file this petition was filed on January 5, 2004. On January 8, 2004, the extension was granted up to and including March 12, 2004.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1343

18 U.S.C. § 3237(a)

STATEMENT OF THE CASE

Petitioner Hawkins was convicted of one count of conspiracy to commit wire fraud and one count of wire fraud in violation of 18 U.S.C. § 1343 in the Southern District of Illinois on December 19,

2002. Petitioner then appealed his conviction to the Seventh Circuit Court of Appeals, contending *inter alia*, that venue in the Southern District of Illinois for the substantive count of wire fraud was improper, as the underlying wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District. The Seventh Circuit affirmed his conviction on August 14, 2003. Petitioner requested rehearing, and rehearing en banc, which were denied on October 10, 2003. The present petition followed.

FACTS MATERIAL TO THE QUESTIONS PRESENTED

Petitioner was charged in a two count indictment with wire fraud and conspiracy to commit wire fraud for his alleged participation in a bribery scheme that purportedly facilitated distribution of defective batteries.

Petitioner was CEO of Exide Corporation, a battery manufacturer. The case involved the manufacture and sale of Exide batteries as the DieHard batteries sold by Sears.

Specifically, the substantive wire fraud count (Count II of the Second Superceding Indictment) about which Hawkins complains charged Petitioner with causing to be transmitted by wire from an Exide bank account at the CoreStates Bank in Philadelphia, Pennsylvania, wire transfer number B00035879, writings, signs, and symbols representing $10,000 cash to an account maintained at the Bank of Palatine, Illinois, in the name of D. G. Consulting, Inc., Account No. 051-594-01. This wire went to a bank and an account outside the Southern District of Illinois.

Petitioner argued in the trial court and at the Seventh Circuit that venue was not proper in the Southern District of Illinois.

Specifically, Petitioner's contention in support of this argument was that a wire transfer from a bank in the Eastern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois.

The Seventh Circuit held that because Defendants intended to defraud customers in the Southern District of Illinois, wires were used to promote the sale of defective batteries through false advertising in the Southern District of Illinois, batteries were distributed and sold in the district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product, venue was proper.

The Seventh Circuit held that these fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the intent to defraud which is an element of the crime of wire fraud.

It is on this basis that Petitioner argues his conviction on Count I should be vacated. Petitioner received a total ten year term, five of which resulted from conviction on this count.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Ruling Creates a Direct Conflict Between the Permissible Bases for and the Elements of Wire Fraud Requisite for Proper Venue in the Seventh and Ninth Circuits that Can Only Be Resolved by this Court's Clarification of the Law.

A. The Decision Below Concretizes the Conflict Between the Seventh and Ninth Circuits Over the Permissible Bases for

Venue by Explicitly Affirming the Sufficiency of Intended Effects for Proper Venue Thus Rendering the Conflict Ripe for the Court's Review.

The lower court's ruling explicitly confirms the sufficiency of the intended effects of unlawful conduct in a given district to establish venue therein in the Seventh Circuit, *see United States v. Pearson*, 340 F.3d 459, 466 (7th Cir.2003), while the Ninth Circuit has ruled that proper venue for wire fraud offenses under the rubric announced in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 n.2 (1999), requires a direct connection between the "misuse of wires" and the physical locus thereof. S*ee United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002). Finding that Petitioner's "fraudulent activities in the Southern District of Illinois provided critical evidence of the 'intent to defraud' element" of wire fraud, and that as evidence of a "continuing offense" sufficient under the Seventh Circuit's interpretation of 18 U.S.C. 3237(a) to establish venue in the Southern District for a separate wire fraud count, *see Pearson*, 340 F.3d 459, 466 (7th Cir.2003) (quoting *United States v. Ringer*, 300 F.3d 788, 792 (7th Cir. 2002) ("for continuing offenses "venue is only improper 'if the only acts that occurred in that district do not provide evidence of the elements of the charged crime."), and *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000)), the lower court affirmed the Seventh Circuit's "intended effects" test for determining where, other than the physical locus of a crime's commission, venue is proper. With this question not decided in *Rodriguez-Moreno*, 526 U.S. 275, 279 n.2 (1999), the Seventh Circuit adhered to its earlier rulings that venue is proper in a district(s) where "an overt act is intended to have an effect." *Pearson*, 340 F.3d 459, 466 (7th Cir. 2003).

Under this standard, both the intended effects of unlawful conduct and conduct providing evidence of either essential element of wire fraud in a given district are sufficient to establish proper

venue in that district, even if the "use of the wires" at issue bears no physical relationship to that district. The lower court's ruling thus consolidates the law of the Seventh Circuit on two distinct but related issues: (1) the permissible bases for venue (i.e., *locus delicti* and effects of unlawful conduct); and (2) the sufficiency of conduct constituting either "essential element" of wire fraud for proper venue. Crucially, the Ninth Circuit case cited by the lower court in distinguishing the Seventh Circuit's law on the bases for venue also sets forth the Ninth Circuit's position on the second issue, namely, that venue is proper only where the "essential conduct," the "misuse of the wires," occurs. S*ee United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002); *Pearson*, 340 F.3d at 467 n.2 (rejecting the Government's contention that venue is proper in districts "where the defendant's illicit scheme had been concocted."). As the respective standards have been reiterated in the years following Rodriguez-Moreno they have coalesced into concrete rules, and with the lower court's explicit affirmation of the Seventh Circuit's prior decisions in repudiating the Ninth Circuit's doctrine, the conflict between them is now ripe for the review it urgently requires.

A. The Decision Below Also Sharpens Related Conflicts Between the Circuits' Definition of the "Nature of Wire Fraud" and the Relationship Between "Essential Elements" Under *Rodriguez-Moreno* into Justiciable Controversies.

The conflict between the Seventh and Ninth Circuits over the permissible bases for venue accentuates their opposition in two related areas, and as such indicates that conflict between these circuits' venue rules is robust, and as such promises to generate divergent outcomes in a broad range of cases. First, the Seventh and Ninth Circuit's have defined the "nature of wire fraud" and its constitutive conduct in stark opposition; significantly, these distinctions tend to vary the nature of the substantive nature of the

offense in these jurisdictions. The Seventh Circuit defined Petitioner's "crime of wire fraud focused on defrauding and concealing their deceit of consumers." *Pearson*, 340 F.3d 466-67. The Ninth Circuit, in contrast, interpreted *Rodriguez-Moreno* to make the "nature of wire fraud" dependent on "its essential conduct elements," which it identified as "misuse and any acts that cause such misuse of the wires." *Pace*, 314 F.3d at 349-50. The *Pace* court thus concluded that while "a fraudulent scheme may be an element" of the offense, "it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct." *Id.*

The distinctive constructions of the "nature of wire fraud" contribute to the divergent rules for localizing its commission. Characterizing Petitioner's "crime of wire fraud as a scheme to defraud consumers and conceal that deceit," *Pearson*, 340 F.3d 466-67, the Seventh Circuit readily identified "fraudulent activities" bearing no connection to the "misuse of wire" count involving Petitioner's wire transfer, and as such, transferring any "intent to defraud" corroborated by conduct in the Southern District of Illinois to the execution of the wire transfer elsewhere. The Ninth Circuit's identification of "misuse of wires" as the "essential nature of wire fraud" similarly undergirds its rejection of conduct pertaining to the "scheme to defraud" as a proper basis for venue. *Pace*, 314 F.3d at 349-50.

While subtle, these distinctions between the circuits' characterization of the "nature of wire fraud" suggest real systemic costs arising from divergent venue rules: namely, in their characterization of the essential "nature of the crime," they expose the significant policy interests served by proscribing conduct. The lower court's characterization of wire fraud "as a scheme to defraud consumers and conceal that deceit," it renders the substantive offenses of wire fraud and fraudulent schemes proscribed elsewhere,

i.e., securities fraud, banking fraud. As such, with this focus, the court imports a solicitous germane for consumer protection but ignores alternative interests germane exclusively to the misuse of wires. In *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001), the Ninth Circuit emphasizes the legislative history of the wire fraud statute in relation to the provisions of the mail fraud statute. 18 U.S.C. § 1343 was enacted, the court explains, to protect the sanctity of the wires as "means" of communication. *Id.* As such, the wire fraud statute is less concerned with the victims of fraudulent schemes than their threat to the nation's communication infrastructure. With the technological developments of modern society, where an increasing portion of the nation's commercial and social transactions rely on use of now various "wires," the importance preserving interests distorted by divergent characterizations of the "nature of the crime" in rules governing venue. Yet this compelling interest cannot be secured in the absence of this court's clarification of the dependence of the "nature of wire fraud" on its essential "conduct elements" implicated by *Rodriguez-Moreno*'s requisite venue inquiry.

Second, as suggested by their definitions of the nature of wire fraud, the circuits are sharply divided by their respective conceptions of the relationship between the "essential elements" of wire fraud requisite for purposes of identifying proper venue(s). The lower court's decision in the instant case illustrates the Seventh Circuit's treatment of "an intent to defraud" and "use of the wires in furtherance of that intent or scheme" as conduct elements whose commission in a given district establishes venue therein; that is, the intent and "fraudulent activities" in furtherance thereof in the Southern District of Illinois established venue in the Southern District, while separate acts of wire misuse may be tried in any district wherein that scheme to defraud is advanced. Clarifying the relationship between the "essential elements" of wire fraud for venue

purposes accentuates the need for clarification of the law manifest in the circuits' definition of the "nature of the crime."

II. The Antagonism Between the Seventh and Ninth Circuits' Venue Rules Is Not a Discrete Conflict But a Significant Controversy Similarly Dividing the Second and Fourth Circuits and Demonstrates the Urgent Need for Intervention by This Court to Clarify the Proper Bases for Venue Under the Sixth Amendment

A. The Conflict Between the Seventh and Ninth Circuits Acknowledged By the Lower Court Similarly Divides the Second and Fourth Circuits and Signals a Genuine Legal Controversy Demanding Clarification by This Court.

While the conflicting rubrics and legal rules adopted by the Seventh and Ninth Circuits itself merits this Court's review, given the constitutional significance of the Sixth Amendment's venue restrictions. The fact that the Second Circuit has adopted an "effects test" similar to that endorsed by the Seventh Circuit, *see United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003) ("venue proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue"), while the Fourth Circuit has adopted rules limiting venue to the locus of "essential conduct" closely parallel the "causal connection" to prohibited wire misuse required by the Ninth Circuit, *see United States v. Mitchell*, 70 Fed.Appx. 707 (4th Cir. 2003) (citing *United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000), citing *United States v. Cabrales*, 524 U.S. 1 (1998), and *Rodriguez-Mareno*, 526 U.S. 275 (1999), "in support of the proposition that 'venue is limited to the place where the essential conduct elements occur, without regard to the place where other essential elements of

the crime occur"), suggests that the conflict between the Seventh and Ninth Circuit's addressed by lower court's decisions should not be dismissed as a discrete fissure in which this Court should not intervene. Instead, the lower court's decision should be considered in light of the parallel rules in the Second and Fourth Circuits, as a microcosmic illustration of how conflicts between the analytical rubrics which define and structure the legal issues relevant to the identification of the proper venue can cascade into a series of more discrete conflicts among the specific rules which guide the courts' consideration of the relevant legal issues as they arise in the facts of concrete cases. In doing so, the need for and propriety of this Court's intervention to clarify whether venue is proper only where the essential conduct elements of the offense occur, if not, whether venue is proper only where both the conduct and circumstantial elements of the offense occur, and finally, whether venue is proper where unlawful conduct in another district generates effects.

B. The Current Division Between the Circuits Has Significant Institutional Costs Justify Intervention By This Court and Counsel Immediate Action.

Absent this Court's authoritative intervention in controversy currently fragmenting the federal circuits as a result of the now pointedly antagonistic doctrinal rubrics and corresponding rules governing venue currently fragmenting the federal circuits, controversies festering of two salient issues not decided in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), the circuit-specific venue rules it left undisturbed will continue to influence appellate courts' analyses under the *Rodriguez-Moreno* inquiry while intensifying now *direct* conflicts between the circuits over antagonistic tests not previously scrutinized. In fact, the Seventh Circuit's ruling in the instant case illustrates the balkanization of

venue law as lower courts have integrated the *Rodriguez-Moreno* inquiry, 526 U.S. at 270, into the framework of the circuits' preexisting venue rules. The survival of these jurisdiction-specific venue rules is, in essence, an artifact of the *Rodriguez-Moreno* Court's cautious deferral of these questions; the first, not properly before the Court, and the second, though entailed by the Court's venue analysis, was not yet ripe for decision. Petitioner Hawkins thus urges the Court to grant review in order to consider the issues now sharply dividing the appellate courts and squarely presented for its consideration by the lower court's ruling.

CONCLUSION

Petitioner Hawkins respectfully appeals to this Court's unique institutional competence to determine "what the law is," *Marbury v. Madison*, 5 U.S. 137 (1803), and to ensure that level of coherence among lower courts required by a nation governed by the rule of law, in requesting that the Court grant his petition for review in the instant case. Petitioner urges that the constitutional and cultural importance of a coherent law of venue in a nation increasingly dependent on use of the wires for completion of its commercial and cultural projects should not be undervalued. *Cf. United States v. Saavedra*, 223 F.3d 85, 86 (2d Cir. 2000) (constitutional venue restrictions were "intended to afford an accused the protection of being tried...where...physically present when the crime was committed...But in today's wired world of telecommunication and technology, it is often difficult to determine exactly where a crime was committed, since different elements may be widely scattered in both time and space, and...may not coincide with the accused's actual presence."). This Court's review of a decision that explicitly announces a direct conflict between the analytical tests for determining proper venue in wire fraud cases in the Seventh, Second,

Ninth, and Fourth Circuits also promises socially desirable systemic benefits.

The appellate courts' markedly divergent interpretations of this Court's decision in *Rodriguez-Moreno*, 526 U.S. 275, and the antagonism between the circuits' doctrinal frameworks made evident by the lower court's explicit rejection of the "causal and direct connection to misuse of wires" test endorsed by the Ninth Circuit, forecloses reasonable expectation that cases arising in the short- or intermediate-term will permit resolution of this conflict at the appellate court level. While Petitioner is sensitive to the Court's institutional reluctance to issue mandates displacing latitude conventionally reserved to lower courts to fill gaps and resolve ambiguities in the law more organically, the antagonism between the venue laws of the respective circuits are sufficiently acute to justify the Court's exercise of its institutional power in the interest of systemic uniformity in an area of law increasingly influential in the social and commercial projects of a range of societal actors. Moreover, the compelling considerations *ordinarily* incumbent upon this Court in its role as arbiter of conflicts among the lower courts *intensified* by the urgent need for resolution of this legal controversy before it creates undesirable risk aversion among technological innovators and commercial enterprises. The convergence of constitutional and institutional interests in resolution of the conflict dividing the laws governing venue in the Seventh, Second, Ninth, and Fourth Circuits, Petitioner urges the Court to review the questions presented by the instant case.

For the reasons expressed in the foregoing, Petitioner Hawkins by and through undersigned counsel, respectfully requests that the Court grant his petition for review in the present case.

Respectfully submitted,

Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins

APPENDIX A

United States Courts of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 10, 2003

Before

Hon. Ilana Diamond Rovner, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

Nos. D3-100S, 03-1232

United States of America	
Plaintiff-Appellee,	**Appeals from the United States District Court for the Southern District of Illinois**
v.	**No. 01 CR 30006**
Arthur M. Hawkins,	
Defendant-Appellant.	**David R. Herndon, *Judge***

ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for Mr. Hawkins on August 28, 2003, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing is DENIED.

United States Courts Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
October 14, 2003

Before

Hon. Ilana Diamond Rovner, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

NOS. D3-100S, 03-1232

United States of America
Plaintiff-Appellee,

Appeals from the United States District Court for the Southern District of Illinois

v.

NO. 01 CR 30006

Arthur M. Hawkins,
Defendant-Appellant.

David R. Herndon, *Judge.*

AMENDED ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for Mr. Hawkins on August 28, 2003, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.[1]

Accordingly, the petition for rehearing is DENIED.

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[1]Chief Judge Joel M. Flaum and Judge Kenneth F. Ripple took no part in the consideration of this case.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 02-4356, 03-1005 & 03-1232

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS N. PEARSON and
ARTHUR M. HAWKINS,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois.
No. 01 CR 30006—**David R. Herndon**, *Judge.*

ARGUED MAY 27, 2003—DECIDED AUGUST 14, 2003

Before ROVNER, DIANE P. WOOD, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Arthur Hawkins and Douglas Pearson were convicted of wire fraud and conspiracy to commit wire fraud based on their participation in a bribery scheme that facilitated the distribution of their company's defective batteries. Hawkins and Pearson appeal their convictions, arguing, among other things, that they should not have been tried on a superceding indictment that was filed outside the relevant statute of limitations, their case should not have been tried in the Southern District of Illinois, they were prejudiced by certain discovery

rulings of the district court, and the district court improperly limited their ability to examine a key witness at trial. We reject all of their arguments and affirm the judgment of the district court in all respects.

I. BACKGROUND

Arthur Hawkins and Douglas Pearson were officers of Exide Corporation, a battery manufacturer. Hawkins was the CEO and Chair of the Board of Directors, while Pearson served as Executive Vice President of Sales and Marketing and later as President of North American Operations. In 1993, Exide bid on a contract to manufacture DieHard batteries for Sears. Exide's bid contained a promise of "space age technology," and it stated that Exide's DieHard batteries would contain silvium II (silver additive), high utilization paste, and one-inch breed lugs. In April 1994, Exide was awarded the DieHard contract.

Despite Exide's promises, the batteries it manufactured contained only trace amounts of silver, the high utilization paste did not add any value to the battery, and the one-inch lug created a design flaw. As early as October 1994, soon after the batteries were rolled out in Sears stores, Exide officials were warned of significant quality problems with the batteries. As a result, Sears indicated to Exide that it was in jeopardy of losing the DieHard business. By the end of October, Exide went into approximately 700 stores nationwide to remove defective batteries from the shelves.

In order to keep the lucrative Sears contract, Exide bribed Gary Marks, Sears's battery buyer. Beginning in March 1995 and continuing through February 1996, Exide made several payments of approximately $10,000 each to Marks. At first, Joseph Calio, Senior Vice President of Sales and Marketing for Exide, gave the bribes to Marks. After Calio complained about making the payments, Exide sent the bribes to Marks's phony consulting company,

DG Consulting, by check or wire. Marks left Sears in July 1997.

In April 1998, Hawkins informed Marks that Calio had implicated Marks in an investigation by the Florida Attorney General's Office into the Exide bribery scheme. In order to cover up their arrangement, Hawkins and Marks concocted a phony consulting agreement between Exide and DG Consulting and created supporting backdated documents to substantiate the bribe payments. Hawkins paid Marks $15,000 in spring of 1999 and an additional $10,000 later that fall for Marks's participation in the cover-up scheme and for his execution of the false cover-up documents.

In January 2001, Hawkins and Pearson were charged in a two-count indictment with wire fraud and conspiracy to commit wire fraud. The indictment, which was filed under seal, charged that the batteries failed testing standards and that Exide falsified internal quality assurance reports to hide latent manufacturing defects. It also charged that Exide supplied the defective batteries to Sears distribution centers, causing defective batteries to be distributed nationwide to consumers, and defendants failed to recall batteries that were known to be defective. In addition, there were allegations that Exide falsely advertised that the batteries were manufactured with certain "proprietary features" when the batteries either did not contain the features or they added nothing to the durability or quality of the batteries. Finally, according to the indictment, after the defective batteries were in the stores, defendants made unlawful payments to Marks in an attempt to influence his independent judgment and to promote the business arrangement with Sears, and then concealed the unlawful

payments by causing corporate financial records to be falsified.[1]

After the original indictment was returned against Hawkins and Pearson in January 2001, two superceding indictments were filed in open court in March 2001, then in July 2001. Hawkins and Pearson were tried on the second superceding indictment beginning on March 18, 2002. Following approximately three months of trial, a jury convicted Hawkins and Pearson on both counts. Hawkins was sentenced to 120 months' imprisonment, a three-year term of supervised release, and a fine of $1 million, while Pearson received a sentence of 64 months' imprisonment, a two-year term of supervised release, and a fine of $150,000. Defendants appeal.

II. ANALYSIS

Hawkins and Pearson have taken a kitchen-sink approach to their appeal, filing separate briefs (with voluminous appendices) and together raising over a dozen distinct issues, each with their own sub-contentions. Neither challenges the sufficiency of the evidence to support their conviction. In the face of the avalanche of issues they have raised, we will focus here on defendants' most substantive contentions.

---

[1] In March 2001, Marks and Calio pled guilty to wire fraud and signed plea agreements with the government. In December 2001, Sears Automotive Marketing Services, Inc., a subsidiary of Sears, entered into a pretrial diversion agreement in which the U.S. Attorney's Office agreed not to prosecute it in exchange for a payment of $62.6 million.

A. Superceding Indictment

Defendants first argue they were tried under a second superceding indictment that, because it was returned outside the statute of limitations period and did not relate back to the original indictment, was time-barred. We review the district court's ruling regarding the statute of limitations de novo. *United States v. Anderson*, 188 F.3d 886, 888 (7th Cir. 1999). The original indictment against defendants, which included a wire-fraud count for the wiring of money on January 31, 1996, was filed January 19, 2001, within the five-year statute of limitations. *See* 18 U.S.C. § 3282. Subsequently, a first superceding indictment was returned on March 22, 2001, and a second superceding indictment was returned July 19, 2001. Although only the original indictment was filed within the five-year limit, "a superceding indictment that supplants a still-pending original indictment relates back to the original indictment's filing date so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996). Defendants have two statute of limitations complaints about the indictments: the original indictment was filed under seal and the later indictments do not relate back to the original indictment.

We first address defendants' concern that the original indictment was sealed. Defendants argue that despite the fact that filing an indictment within the statute of limitations period tolls the running of the statute of limitations, it should not have been tolled in this case because the original indictment was filed under seal. Federal Rule of Criminal Procedure 6(e)(4) provides that a court "may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial." Rule 6 does not require the statute of limitations analysis to be altered when an indictment is sealed, and we see no reason why, in a case such as this where an open indictment was filed only

two months later, the statute of limitations should continue to run after a sealed indictment has been returned. *See United States v. Thompson*, 287 F.3d 1244, 1251 (10th Cir. 2002); *United States v. Edwards*, 777 F.2d 644, 647 (11th Cir. 1985); *United States v. Watson*, 599 F.2d 1149, 1154 (2d Cir. 1979).

Hawkins also complains that because the original indictment has remained under seal, his counsel has never been able to determine whether the first superceding indictment relates back to the original indictment. The district court conducted an *in camera* comparison of the original indictment to the first superceding indictment and determined that the only difference between the two was the removal in the latter of the identity of an unindicted coconspirator. Our review confirms this minor change, which, since it does not alter or amend the charges against the defendants in any way, does not offend the statute of limitations.

This is not to say, however, that it was proper for the indictment to indefinitely remain under seal in the district court. Pearson and the government acknowledge that the identity of the coconspirator named in the original indictment has been publicly revealed. This court has repeatedly recognized the paramount importance of providing public access to court proceedings, especially in criminal matters. *See, e.g., In re Associated Press v. Ladd*, 162 F.3d 503, 509-10 (7th Cir. 1998); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). At the very least, once the identity of the unindicted coconspirator became known, the indictment should have been unsealed, and it is, as of this date, unsealed.[2]

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[2] We remind litigants that under Seventh Circuit Operating Procedure 10, "[e]xcept to the extent portions of the record are required to be sealed by statute . . . every document filed in or by

(continued...)

Defendants' second statute of limitations argument is that changes made to the conspiracy count in the second superceding indictment materially broadened the charge, preventing it from "relating back" to the original indictment, and leaving it time-barred. The second superceding indictment modified the end date of the conspiracy from February 1996 to September 2000 and added three overt acts which occurred during that time. Defendants argue that the three acts—Hawkins's preparation of Marks's false affidavit, his preparation of a phony consulting agreement, and his false testimony about the consulting agreement—were not part of the wire fraud conspiracy and thus expanded the alleged crime. However, "the fact that the 'central objective' of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy." *United States v. Hickey*, 360 F.2d 127, 141 (7th Cir. 1966). Here, the uninterrupted success of the conspiracy turned on defendants' ability to continuously conceal the truth about the defective batteries from consumers and Exide shareholders. Hawkins's acts to prop up the scheme were an integral part of the continuing actions of deceit. We find that defendants were on notice of the charges pending against them because "the initial indictment informed appellant[s] in no uncertain terms that [they] would have to account for essentially the same conduct with which [they were] ultimately charged in the superceding indictment," *United States v. O'Bryant*, 998 F.2d 21, 24 (1st Cir. 1993), and therefore the second superceding indictment did not violate the statute of limitations.

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[2] (...continued)
this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by . . . this procedure."

B. Venue

We next examine Pearson and Hawkins's arguments that venue was not proper in the Southern District of Illinois. We review claims of improper venue to determine "whether the government proved by a preponderance of the evidence that the crimes occurred in the district charged, viewing the evidence in the light most favorable to the government." *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000). Article III of the Constitution stipulates that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," § 2, cl. 3, and the Sixth Amendment similarly requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." These Constitutional conditions also are echoed in Federal Rule of Criminal Procedure 18, which dictates that a criminal prosecution must occur "in a district in which the offense was committed." Because the wire fraud statute does not contain a specific statutory venue provision, the general venue provision for offenses that occur in more than one state or district, 18 U.S.C. § 3237(a), applies here: "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

Defendants contend that the substantive wire fraud count should not have been tried in the Southern District of Illinois because the basis for that count, a wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois. In cases interpreting the application of § 3237(a), this court has held that "venue is only improper 'if the only acts that occurred in that district do not provide evidence of the elements of the charged crime.'" *United States v.*

Ringer, 300 F.3d 788, 792 (7th Cir. 2002) (quoting *Ochoa*, 229 F.3d at 636).

In *Ringer*, the defendant was charged with making false statements to federal officers in the Eastern District of Kentucky and was tried in the Southern District of Indiana. *Id.* at 790. We held that venue was proper in the Southern District of Indiana because, although the statements occurred elsewhere, they were intended to influence a trial set to occur in the Southern District of Indiana, and the materiality of the statements was an element of the crime. *Id.* at 792. Similarly, in *United States v. Frederick*, 835 F.2d 1211, 1212 (7th Cir. 1987), venue was proper in the Northern District of Illinois when a defendant was charged with witness tampering that occurred in the Southern District of Florida but was intended to affect a trial in the Northern District of Illinois. We explained that "[p]roper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act is intended to have an effect in the district where the case is finally brought, venue is proper." *Id.* at 1215.

In the instant case, defendants intended to defraud customers in the Southern District of Illinois. They were charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois. Moreover, the defective batteries themselves were distributed and sold in that district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product. The Exide Corporation, a defendant in a companion case, was charged with similar crimes and pled guilty in the Southern District of Illinois.

These fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the "intent to defraud," an element of the crime of wire fraud. *See*

United States v. O'Brien, 119 F.3d 523, 532 (7th Cir. 1997); *see also* 18 U.S.C. § 1343. The Supreme Court has emphasized that when analyzing venue, courts must inquire into the nature of the offense, *see United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (upholding venue in prosecution of firearm offense where crime of violence, an essential element of the firearm offense, occurred in the trial district), and Pearson and Hawkins's crime of wire fraud focused on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois.[3]

Hawkins also complains that venue was improper as to the conspiracy count. Both the sale of defective batteries and the broadcasting of advertisements in the Southern District of Illinois were overt acts that supported the charge of conspiracy to commit mail fraud. "As long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there." *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985). Venue for both the conspiracy and substantive wire fraud counts was proper in the Southern District of Illinois.

C. Discovery and Pretrial Rulings

Defendants also raise several objections to pretrial rulings by the district court, and we review their complaints keeping in mind that "[d]istrict courts have broad discretion in discovery matters." *Packman v. Chicago Tribune Co.*, 267

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[3] Although neither party discusses the case, in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002), the Ninth Circuit held that venue for a wire fraud offense may only "lie where there is a direct or causal connection to the . . . wires." This approach differs with the rubric we have established for analyzing venue in *Frederick*, *Ochoa*, and *Ringer*, and we decline to adopt the analysis outlined by the Ninth Circuit in *Pace*.

F.3d 628, 646 (7th Cir. 2001). We review discovery challenges for abuse of discretion, and "[w]e shall not reverse the district court's ruling absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to [defendants]." *Id.* at 646; *see also United States v. Avery*, 208 F.3d 597, 601 (7th Cir. 2000). We note at the outset that the government maintained an open-file policy in this case, by which defendants, through their copy vendor, could copy all of the government's records, and the district court observed that defendants had "extraordinary access" to documents in this case. Furthermore, defendants have failed to show actual prejudice from any of the issues they have raised with the discovery process. Despite this fatal flaw, we will briefly discuss their contentions for the sake of completeness.

We first review the district court's rejection of defendants' motion for a continuance. In late January 2002, Pearson moved for a trial continuance, the third such request made by defendants. Defendants argue that they needed more time to prepare for trial because 86 boxes of discovery material had not yet been copied by defendants' copy vendor, and because of the large volume of documents. Importantly, defendants do not argue that the government did not make the 86 boxes of documents available to them, only that the log maintained by the U.S. Postal Inspector's Office to account for the government boxes being taken for copying by defendants' copy vendor indicated that 86 boxes had not yet been copied.[4] After providing defendants free and open access to the documents through its open-file policy, the government was under no obligation to ensure

[4] Defendants also complain about an additional 23 boxes that the log indicates were received by defendants' copy vendor, but of which defendants did not receive copies. This seems to be a problem more properly addressed to the copy vendor, not to the court.

that defendants took advantage of the open files by actually copying or reviewing each box. Further, although there was a large amount of discovery to review in preparation for trial, defendants had one year from the date of the first superceding indictment and seven and one-half months from the date of the second superceding indictment to prepare for trial. We do not find any abuse of discretion in the district court's denial of defendants' motion for a continuance, as defendants had adequate time and access to discovery in order to prepare for trial.

Second, we consider defendants' argument that the district court should have required the government to provide defendants with a list of potential witnesses and a list of its trial exhibits. Despite the fact that Federal Rule of Criminal Procedure 16 addresses many of the defendants' concerns, their briefs are noticeably silent as to the Rule's provisions. Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents . . . or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

As we have noted before, the law is clear that neither the Constitution nor Rule 16 entitles a defendant to a list of all prospective witnesses before trial in a noncapital case. *See United States v. Napue*, 834 F.2d 1311, 1317 (7th Cir.

1987).[5] The district court may require the government to provide a witness list, *see United States v. Edwards*, 47 F.3d 841, 843 (7th Cir. 1995); *United States v. Jackson*, 508 F.2d 1001, 1006 (7th Cir. 1975), but, as Congress recognized when it declined to include such a requirement in Rule 16, a district court may also choose not to exercise that prerogative, since providing a witness list might in some cases discourage witnesses from testifying or lead to "'improper contact directed at influencing their testimony.'" *Napue*, 834 F.2d at 1317 (quoting H.R. CONF. REP. NO. 94-414 (1975), *reprinted in* U.S.S.C.A.N. 674, 713, 716). With respect to the provision of an exhibit list, defendants admit that they received copies of the exhibits themselves, and they limit their complaint to the lack of a list of the exhibits to aid in their organization for trial. As noted earlier, Rule 16 requires the government to make certain physical objects and documents available for inspection and copying, but it is silent as to any responsibility by the government to provide an organizational guide to those materials for defendants. Although provision of an exhibit list likely would have made this trial more efficient for all involved, and we certainly encourage parties to exchange them pretrial, we cannot find the district court abused its discretion for failing to order the government to furnish lists that Rule 16 does not require it to provide.[6]

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[5] We note that defendants do not argue that the government failed to comply with the Jencks Act, 18 U.S.C. § 3500(b), which requires the government, upon defendants' motion, to produce statements made by any of its witnesses which the particular witnesses signed, adopted, or approved, and which pertain to their testimony at trial. Instead, defendants' argument focuses on the provision of a list of witnesses before they took the stand.

[6] Because the government did provide the district court with a courtesy copy of an exhibit list, defendants also argue that the

(continued...)

Next, defendants argue that the district court erred in rejecting their motion to compel the production of approximately 3800 allegedly-defective batteries that the government obtained from Sears. Defendants allege that, despite the fact that the batteries were never introduced at trial, the government's refusal to turn over the batteries compromised their ability to defend against the accusation that the batteries were defective because they could not have the batteries tested to determine their quality. The batteries were never analyzed by any party, and the government contends that they could not have been tested because their condition had deteriorated to a point that made reliable testing impossible. Defendants disagree and argue that testing would have been merely difficult, not impossible. Rule 16 requires the government to provide access to objects "which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." In *United States v. Armstrong*, 517 U.S. 456, 462 (1996), the Court held that "material to the preparation of the defendant's defense" means "the defendant's response to the Government's case in chief," and does not include materials deemed by defendants to be necessary to prove their own defense theory or to challenge the pros-

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[6] (...continued)
government's failure to provide them with the same list constituted *ex parte* communication in violation of *United States v. Culp*, 7 F.3d 613 (7th Cir. 1993). *Culp* rightly noted that the government has a professional obligation under ABA Model Rule of Professional Conduct 3.5(b) to provide a copy to defense counsel of "any papers, documents or exhibits he files with the court in order to avoid an *ex parte* contact with the judge." *Id.* at 616 n.1. Despite the fact that defendants' *ex parte* argument misses the mark—no information was hidden from them since they had copies of the exhibits themselves—we emphasize that simply providing a copy of the exhibit list to the defendants would have avoided this unnecessary dispute.

ecutor's conduct of the case. Defendants argue that even though the 3800 batteries were not part of the government's case, test results could have been used to respond generally to the government's allegations that the batteries were defective. But even if we assume that the batteries could have been tested and we assume that defendants could have used test results to defend against the government's case in chief under *Armstrong*, it is difficult to imagine how defendants could have suffered actual prejudice from the lack of access to the batteries. When Exide pled guilty, it stipulated that the batteries were manufactured and distributed with latent defects. On the other hand, we fail to see what harm could have come from the government turning over the batteries. But given the uncertainty about the condition of the batteries and Exide's stipulation that the batteries were in fact defective, we do not think the district court's denial of defendants' motion to compel the batteries rises to an abuse of discretion.[7]

Finally, defendants allege that the government improperly failed to turn over several documents in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In order to establish a *Brady* violation, defendants must show "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995). Defendants offer three "examples" of *Brady* violations, but in each case fail to articulate why the evidence sought was not available to defendants

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[7] Defendants also object to the district court's refusal to compel production of a CD-Rom holding battery data. The CD-Rom contained an inventory of manufacturing codes and internal serial numbers that were placed on the batteries. We do not see how this information is relevant to defendants' case, and we find no error in the district court's decision to deny defendants' motion to compel.

through the exercise of due diligence. *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002). They first point to the government's refusal to turn over the grand jury testimony of Tim Findlay, who, according to Pearson, coordinated an Exide management buy-out plan to purchase Kmart's auto centers. Putting aside their failure to explain the relevance of Findlay's grand jury testimony to the case at bar, the district court found, and defendants do not dispute, that Findlay was available to be called as a witness for the defense. Defendants' other *Brady* allegations are equally unconvincing. They posit that the government should have turned over the debriefing notes of a co-defendant who pled guilty and agreed to cooperate with the government, and that it should have provided the grand jury testimony of defendant Hawkins's son, Lee Hawkins. These strike us as witnesses who would be easily available to defendants, and defendants have not explained to the contrary. Under these circumstances, we find no error under *Brady* in the district court's refusal to order the government to turn over these materials.

D. Impeachment Evidence

Defendants further contend that the district court erred when it did not allow defendants to introduce certain documents in their cross-examination of Joseph Calio. Evidentiary rulings by the district court are reviewed by this court for abuse of discretion. *United States v. Nedza*, 880 F.2d 896, 903 (7th Cir. 1989). Calio generally testified that he was obtaining money for bribes through wire transfers from Exide and covering it up by signing backdated documents that provided false reasons for the wires. He was also a key witness against Pearson, and he described Pearson's active role in the conspiracy. At trial, defendants attempted to introduce documents that they claim would have provided a legitimate explanation for the wire trans-

fers that Calio testified were fictitious. These documents included airline tickets for European travel in 1995, a passport showing that Calio landed in London in 1995, and an American Express statement including a charge for plane tickets, which defendants apparently sought to support a theory that Calio used the money wired to him by Exide to purchase a personal vacation to Europe rather than to bribe Marks. The government argued that there was no connection between the documents and the bribe money wired to Calio. The district court agreed, finding the documents would be very misleading to the jury, and relied on Federal Rules of Evidence 403 and 608(b) to exclude them. Given the district court's factual finding that the documents were unrelated to the fraudulent transfer, we find no abuse of discretion in the district court's exclusion of the potentially misleading documents. *See United States v. Thomas*, 321 F.3d 627, 630 (7th Cir. 2003) ("The balancing of probative value and prejudice is a highly discretionary assessment, and we accord the district court's discretion great deference, only disturbing it if no reasonable person could agree with the ruling."); *Chase v. Consol. Foods Corp.*, 744 F.2d 566, 571 (7th Cir. 1984) ("Since the trial judge has the feel of the jury in a way that the appellate court cannot, his ruling [excluding potentially misleading evidence] will rarely be disturbed on appeal.").

Defendants also contend that the court erred in ending the defense's examination of Calio. The court excused Calio from the witness stand after a hearing in chambers in which the government argued that Pearson's attorney suggested to Calio's counsel that Calio may have breached his plea agreement with the government, that he should assert his Fifth Amendment privilege against self-incrimination, and the defense would then move to strike all of Calio's testimony. At the time the district court ended Calio's testimony, Calio had testified as a government witness for three days, including substantial cross-examination

by defendants, and had then been recalled by defendants as a witness for the defense. Defendants claim that, as a result of the court's ruling, they did not have the opportunity to examine Calio as to certain conversations he had with government witness Rick Randalls, although defendants do not explain the significance of this evidence or why it had not been discussed with the witness earlier.

During the three and one-half days Calio had been on the stand, the defense had ample opportunities to impeach Calio on many different issues. "Merely cumulative evidence is excludable, as having little probative value, Fed. R. Evid. 403; merely cumulative impeachment evidence likewise." *United States v. Boyd*, 55 F.3d 239, 246 (7th Cir. 1995). Defendants thoroughly questioned Calio on issues including discrepancies in his accounts of alleged meetings with the defendants, misstatements in a deposition with the Florida Attorney General, tax evasion, his possible bias against Pearson including statements that he "hated Pearson" and had commented on Pearson's sexual orientation, and the fact that he received a deal from the government for his testimony. They do not explain why additional testimony from Calio would have been anything but cumulative. "Determining whether testimony is cumulative rests within the sound discretion of the district court," *United States v. Gardner*, 211 F.3d 1049, 1055 (7th Cir. 2000), and we find no abuse of discretion by the district court in ending Calio's testimony.

Hawkins and Pearson raised a number of other issues in their appeals, and although we have considered each of these arguments, we conclude that they are without merit and are of insufficient importance to discuss here.

III. CONCLUSION

Accordingly, we AFFIRM the convictions and sentences of the defendants.

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No. 03-1326

In the Supreme Court of the United States

ARTHUR M. HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether venue in petitioner's prosecution for wire fraud was proper, when the government alleged and subsequently proved that acts taken in furtherance of the fraudulent scheme, including the airing of false television advertisements, occurred in the district of prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B at 1-19) is reported at 340 F.3d 459. The opinion of the district court denying petitioner's motion for a change of venue (App., *infra*, 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2003. A petition for rehearing was denied on October 10, 2003, and an amended order denying the petition for rehearing was issued on October 14, 2003 (Pet. App. A at 1-2). On January 8, 2004, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 12, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was found guilty on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371, and one count of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. B at 1; Gov't C.A. Br. 3-4. He was sentenced to consecutive terms of imprisonment of 60 months on each count, for a total of 120 months of imprisonment. Pearson Separate C.A. App. SA1045. The court of appeals affirmed. Pet. App. B at 1-19.

1. Petitioner was the Chief Executive Officer and Chairman of the Board of Exide Corporation, a battery manufacturer. Pet. App. B at 2. In April 1994, Exide was awarded a contract to manufacture DieHard batteries for Sears. The batteries that Exide manufactured pursuant to that contract contained a design flaw and did not conform to the representations made in Exide's bid. By October 1994, Sears warned Exide officials of significant quality problems with the batteries. By the end of that month, Exide removed defective batteries from approximately 700 Sears stores nationwide. *Ibid.*

In order to retain the lucrative Sears contract, Exide bribed Gary Marks, Sears's battery buyer. From March 1995 through February 1996, Exide made several payments of approximately $10,000 each to Marks. After Marks left Sears in July 1997, petitioner informed Marks that an investigation by the Florida Attorney General's Office had implicated Marks in the Exide bribery scheme. Petitioner and Marks attempted to conceal their arrangement by fabricating a consulting agreement and creating backdated documents to substantiate the bribe payments. Petitioner

paid Marks $15,000 in the spring of 1999 and an additional $10,000 in the fall of 1999 in return for Marks's participation in the cover-up. Pet. App. B at 2-3.

2. The federal wire statute establishes criminal penalties for any person who,

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.

18 U.S.C. 1343. In July 2001, a federal grand jury in the Southern District of Illinois returned a two-count second superseding indictment against petitioner; Douglas N. Pearson, Executive Vice President of Sales and Marketing and then-President of North American Operations for Exide; and Alan E. Gauthier, Chief Financial Officer of Exide. Pearson Separate C.A. App. SA46-SA62.[1] Count One of the indictment charged the defendants with conspiracy to commit wire fraud. *Id.* at SA46-SA61; see 18 U.S.C. 371 (establishing criminal penalties for conspiracy "to commit any offense against the United States"). The indictment alleged that, as part of the conspiracy, "a nationwide advertising campaign was run both before and after the initial delivery of the defective batteries. Exide, acting together with the defendants and others, would and did misrepresent and cause to be represented material facts to the

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[1] Marks and Joseph Calio, Senior Vice President of Sales and Marketing for Exide, entered into plea agreements and pleaded guilty to wire fraud in March 2001. Pet. App. B at 4 n.1.

consumers." Pearson Separate C.A. App. SA55. Among the overt acts alleged to have been committed in furtherance of the conspiracy, the indictment charged that "[d]uring 1994, television advertising regarding the DieHard batteries was aired to consumers located in the Southern District of Illinois." *Id.* at SA60.

Count Two of the indictment charged the defendants with wire fraud, in violation of 18 U.S.C. 1343. Pearson Separate C.A. App. SA61-SA62. The substantive wire fraud count "reallege[d] and reincorporate[d] by reference" the allegations in the conspiracy count. *Id.* at SA61. The wire fraud count further alleged that from on or about January 1994 through February 1996, the defendants, in the Southern District of Illinois and elsewhere,

> for the purpose of executing the scheme and artifice to defraud consumers of money and property by means of false and fraudulent pretenses, representations, and promises in connection with the distribution, sale and marketing of Sears' automotive batteries manufactured by Exide, caused to be transmitted by wire from an Exide bank account at CoreStates Bank in Philadelphia, Pennsylvania, wire transfer B00035879, writings, signs, and symbols representing $10,000 cash to an account maintained at the Bank of Palatine, Palatine, Illinois in the name of DG Consulting, Inc., account no. 051-594-01.

Id. at SA62.[2]

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[2] Palatine is a northwestern suburb of Chicago and is located in the Northern District of Illinois.

Pearson argued that venue for the wire fraud count was not proper in the Southern District of Illinois, and he asked that the case be transferred either to the Northern District of Illinois or to the Eastern District of Pennsylvania. See Pearson's Pretrial Motions (May 11, 2001). Petitioner adopted Pearson's pre-trial venue motion. See Government's Omnibus Response to Defendant Pearson's Pre-Trial Motions 2 (June 8, 2001). In opposing that motion, the government stated that, "[w]ith regard to count 2, the case law does not require that a wire pass through the subject district for proper venue on a wire fraud charge. Additionally, the offense is continuing in nature, over a large geographic area, with substantial points of contact and causative acts performed in Southern Illinois." *Id.* at 6. The government further explained: "The indictment alleges, among other causative acts, that the wires were used in interstate commerce, including in Southern Illinois, to promote the sale of known defective batteries through the use of false advertising. While those particular wire transmissions were not charged in count 2 as the subject wires, they were alleged as part of the overall scheme charged in count 2." *Id.* at 8.

The district court determined that venue was "proper in this Court as to both Counts One and Two of the Second Superseding Indictment." App., *infra*, 4a. The court explained that, "[b]ased on the pleadings, the situs of the Defendants' acts include causing the delivery and sale of defective batteries by Sears' distribution centers in the Southern District of Illinois and causing specific acts of concealment to facilitate the scheme, including but not limited to false advertising in the Southern District of Illinois." *Ibid.* The court further observed that the propriety of venue in the Southern District of Illinois did not depend on the

existence of a "personal 'tie' to any of the three Defendants." *Id.* at 5a.

The ensuing jury trial lasted approximately three months. Pet. App. B at 4. With respect to the wire fraud count, the jury was instructed as to venue:

> Count 2 charges a continuing offense occurring in more than one state or district. The Government must prove by a preponderance of the evidence that some part of the crime charged in count 2 of the Indictment occurred in the Southern District of Illinois. Venue is proper in any district in which part of the crime was committed.

Gov't C.A. Br. 21 n.6. (citation omitted). The jury found petitioner and Pearson guilty on both counts of the indictment. Pet. App. B4. Petitioner was sentenced to 120 months of imprisonment, to be followed by three years of supervised release, and was fined $1 million. *Ibid.* The prison sentence consisted of a 60-month term of imprisonment on each count of conviction, to run consecutively pursuant to Sentencing Guidelines § 5G1.2(d). Pearson Separate C.A. App. SA1045.

3. The court of appeals affirmed. Pet. App. B at 1-19. Petitioner and Pearson contended, *inter alia*, that venue on the substantive wire fraud charge was not proper in the Southern District of Illinois. See *id.* at 8-10. In addressing that claim, the court of appeals explained that, under the general federal venue statute governing offenses committed in more than one State or district, "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." *Id.* at 8 (quoting 18 U.S.C. 3237(a)). The court also stated that "[p]roper

venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act is intended to have an effect in the district where the case is finally brought, venue is proper." *Id.* at 9 (quoting *United States* v. *Frederick*, 835 F.2d 1211, 1215 (7th Cir. 1987), cert. denied, 486 U.S. 1013 (1988)).

Petitioner and Pearson contended "that the substantive wire fraud count should not have been tried in the Southern District of Illinois because the basis for that count, a wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois." Pet. App. B at 8. The court of appeals rejected that argument, explaining that petitioner and his co-defendant

> intended to defraud customers in the Southern District of Illinois. They were charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois. Moreover, the defective batteries themselves were distributed and sold in that district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product. The Exide Corporation, a defendant in a companion case, was charged with similar crimes and pled guilty in the Southern District of Illinois.
>
> These fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the "intent to defraud," an element of the crime of wire fraud. The Supreme Court has emphasized that when analyzing venue, courts must inquire into the nature of the offense, *see United*

> *States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) * * * , and Pearson and [petitioner]'s crime of wire fraud focused on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois.

Id. at 9-10 (citations omitted). In a footnote, the court of appeals stated that, "[a]though neither party discusses the case, in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002), the Ninth Circuit held that venue for a wire fraud offense may only 'lie where there is a direct or causal connection to the . . . wires.' This approach differs with the rubric we have established for analyzing venue * * * , and we decline to adopt the analysis outlined by the Ninth Circuit in *Pace*." *Id.* at 10.[3]

ARGUMENT

Petitioner contends (Pet. 4-12) that the courts below erred in ruling that venue was proper in the Southern District of Illinois for the wire fraud count of his indictment. Petitioner further argues (Pet. 5-10) that the court of appeals' resolution of the venue issue is incon-

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[3] Petitioner also contended in the court of appeals that venue in the Southern District of Illinois was improper on the conspiracy count. Pet. App. B at 10. The court rejected that argument, explaining that "[b]oth the sale of defective batteries and the broadcasting of advertisements in the Southern District of Illinois were overt acts that supported the charge of conspiracy to commit mail fraud." *Ibid.* Relying on the principle that "[a]s long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there," the court held that venue was proper in the Southern District of Illinois on the conspiracy count as well as on the substantive wire fraud charge. *Ibid.* (quoting *United States* v. *Molt*, 772 F.2d 366, 369 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986)). In this Court, petitioner does not contest the propriety of venue on the conspiracy charge.

sistent with decisions of other circuits. As the court of appeals explained, however, petitioner's fraudulent scheme was effectuated in part through false television advertising aired in the district of prosecution. Petitioner identifies no decision suggesting that such contacts are insufficient to establish venue in a federal wire fraud case. Because any differences between the legal standards employed by various courts of appeals in resolving venue questions would not affect the disposition of the instant case, the petition for a writ of certiorari should be denied.

1. In *United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999), this Court considered a venue challenge to a conviction for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). The underlying crime of violence in that case was a kidnapping that continued through several States (and thus through several federal judicial districts). See 526 U.S. at 276-277. The defendant was prosecuted in the District of New Jersey, one of the locations in which the victim had been held captive. *Id.* at 277. The Section 924(c)(1) charge was based on evidence that the defendant had used a firearm in Maryland in furtherance of the crime. *Ibid.*

This Court rejected the defendant's argument "that venue was proper only in Maryland, the only place where the Government had proved he had actually used a gun." 526 U.S. at 277. Rather, the Court interpreted Section 924(c)(1) as containing "two distinct conduct elements": "the 'using and carrying' of a gun and the commission of a kidnaping [or other crime of violence]." *Id.* at 280. The Court further explained that "§ 924(c)(1) does not define a 'point-in-time' offense when a firearm is used during and in relation to a continuing crime of violence." *Id.* at 281. It observed that "[t]he kidnaping,

to which the § 924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge * * * was appropriate in any of them." *Id.* at 282. "Where venue is appropriate for the underlying crime of violence," the Court concluded, "so too it is for the § 924(c)(1) offense." *Ibid.*

The same analysis applies here. Like Section 924(c)(1), 18 U.S.C. 1343 requires proof of two distinct elements: that the defendant has devised a "scheme or artifice to defraud," and that he has used a "wire, radio, or television communication in interstate or foreign commerce" to execute that scheme. Like the kidnapping in *Rodriguez-Moreno*, the scheme or artifice to defraud in Section 1343 is a continuing crime for which venue is proper in any district in which a portion of that scheme or artifice was devised and carried out. And, as in *Rodriguez-Moreno*, a wire fraud prosecution under Section 1343 may properly be brought in any district where the fraudulent scheme was devised and implemented, whether or not the wires were used in that district. Thus, the facts that petitioner "intended to defraud consumers in the Southern District of Illinois," and that "the defective batteries themselves were distributed and sold in that district," provide a sufficient basis for rejecting petitioner's venue challenge in this case. Pet. App. B at 9.[4]

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[4] *United States* v. *Cabrales*, 524 U.S. 1 (1998), is not to the contrary. The defendant in *Cabrales* was charged with money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) and 1957, based on financial transactions that were alleged to have occurred in Florida and to have involved funds derived from unlawful cocaine distribution in Missouri. 524 U.S. at 3-4. This Court held that the Western District of Missouri was not a proper venue for the money-laundering prosecution. *Id.* at 6-10. In explaining that

2. As the court of appeals recognized (Pet. App. B at 10 n.3), the Ninth Circuit appears to have taken a more restrictive view of permissible venue in prosecutions under Section 1343. See *United States* v. *Pace*, 314 F.3d 344 (9th Cir. 2002).[5] The court in *Pace* stated that "[a]lthough a fraudulent scheme may be an element of the crime of wire fraud, it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct." *Id.* at

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conclusion, however, the Court emphasized that the money laundering statutes did not prohibit "the anterior criminal conduct that yielded the funds allegedly laundered," and that the defendant was "charged in the money-laundering counts with criminal [money-laundering] activity 'after the fact' of [a different] offense begun and completed by others." *Id.* at 7. In the instant case, by contrast, the basis for laying venue in the Southern District of Illinois was not that petitioner was alleged to have acted "after the fact" to prevent detection of crimes committed by other persons in that district. Rather, petitioner was from the outset an integral member of a criminal scheme, prohibited by the wire fraud statute, to defraud consumers in, *inter alia*, the district of prosecution. Nor, contrary to petitioner's contention (Pet. 5-6), did the lower courts' venue rulings turn on "the intended effects of unlawful conduct in a given district." Cf. *Rodriguez-Moreno*, 526 U.S. at 279 n.2 (reserving that issue). The devising of a scheme to defraud is an element of a wire fraud offense.

[5] In addition to alleging a conflict with *Pace* (see Pet. 5-7), petitioner also contends (Pet. 9-10) that the court of appeals' resolution of the venue issue in the instant case conflicts with the Second Circuit's decision in *United States* v. *Svoboda*, 347 F.3d 471 (2003), cert. denied, No. 03-1438 (May 17, 2004), and the Fourth Circuit's unpublished decision in *United States* v. *Mitchell*, 70 Fed. Appx. 707 (2003), cert. denied, 124 S. Ct. 1114 (2004). Petitioner's reliance on *Svoboda* and *Mitchell* is misplaced. Neither of those cases involved a prosecution under 18 U.S.C. 1343, and the courts of appeals in both cases *rejected* the defendants' venue challenges to their convictions. See *Svoboda*, 347 F.3d at 475, 482-485; *Mitchell*, 70 Fed. Appx. at 709, 710-713.

349. The court indicated that venue in Section 1343 prosecutions was limited to districts "where the wire transmission at issue originated, passed through, or was received, or from which it was orchestrated." *Id.* at 349-350 (internal quotation marks omitted).[6]

In the instant case, however, venue would be proper in the Southern District of Illinois even under the approach taken by the court of appeals in *Pace*. The wire fraud statute applies whenever the defendant, "having devised or intending to devise any scheme or artifice to defraud, * * * transmits or causes to be transmitted by means of wire, radio, *or television* communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. 1343 (emphasis added). The government alleged in petitioner's indictment, and subsequently proved at trial, that false television advertising in the Southern

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[6] After the certiorari petition in the instant case was filed, the Sixth Circuit adopted a similar venue rule for mail fraud prosecutions under 18 U.S.C. 1341. See *United States* v. *Wood*, No. 01-2548, 2004 WL 828097, at *4-*9 (6th Cir. Apr. 19, 2004). Court in *Wood*, however, based its decision on the second paragraph of 18 U.S.C. 3237(a), which states that "[a]ny offense involving the use of the mails * * * may be inquired of and prosecuted in any district from, through, or into which such * * * mail matter * * * moves." See *Wood*, 2004 WL 828097, at *7-*8. The court concluded that "[a] plain reading of the text" of Section 3237(a) "leads us to the conclusion that venue in a mail fraud case is limited to districts where the mail is deposited, received, or moves through, even if the fraud's core was elsewhere." *Id.* at *8. Because 18 U.S.C. 3237(a) contains no comparable language governing offenses that involve the use of *wire* communications, it is by no means clear that the Sixth Circuit would adopt a similar limit on venue in wire fraud prosecutions brought under 18 U.S.C. 1343.

District of Illinois was used to mislead consumers about the characteristics of Exide's batteries. See Pearson Separate C.A. App. SA55, SA56, SA60 (indictment); Gov't C.A. Br. 11 (summarizing record evidence of false television advertising). Both of the courts below relied in part on those television communications in rejecting petitioner's challenge to venue in the Southern District of Illinois. See App., *infra*, 4a (district court explains that, "[b]ased on the pleadings, the situs of the Defendants' acts include causing the delivery and sale of defective batteries by Sears' distribution centers in the Southern District of Illinois and causing specific acts of concealment to facilitate the scheme, including but not limited to false advertising in the Southern District of Illinois"); Pet. App. B at 9 (court of appeals observes that petitioner and his co-defendant were "charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois").

It is true that the substantive wire fraud count of petitioner's indictment (see Pearson Separate C.A. App. SA61-SA62) did not specifically identify the false advertising as a wire or television communication by means of which the fraudulent scheme was executed.[7] The conspiracy count of the indictment alleged, however, that "[a]s a further part of the conspiracy, * * * Exide, acting together with the defendants and others, would and did misrepresent and cause to be represented material facts to the consumers" about the characteristics of the DieHard batteries that Exide had

[7] Rather, the only use of the wires that was described in the wire fraud count was a transfer of funds to a bank located in the Northern District of Illinois. Pearson Separate C.A. App. SA62; see p. 4 & note 2, *supra*.

manufactured. *Id.* at SA55. The conspiracy count also alleged, as an overt act, that television advertising was aired to consumers in the Southern District of Illinois. *Id.* at SA60. The indictment's allegations relating to the conspiracy were expressly "reallege[d] and reincorporate[d] by reference" in the wire fraud count. *Id.* at SA61. The government in opposing the defendants' motion to transfer, and the district court in denying that motion, relied in part on the indictment's allegations of false advertising in the district of prosecution. See p. 5, *supra.*

The indictment's description of the false television advertising in this case as an overt act in furtherance of the defendants' conspiracy to commit wire fraud is, for purposes of determining venue, functionally equivalent to treating that advertising as a communication undertaken "for the purpose of executing [the] scheme or artifice" to defraud. 18 U.S.C. 1343. The venue inquiry turns on the substance of the criminal conduct alleged, not on formal labels. See *Rodriguez-Moreno*, 526 U.S. at 279 ("[T]he *locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.") (internal quotation marks omitted; bracketed material added by the Court). And the trial proof indisputably established that the scheme was executed by the use of the wires, in the form of television communications, within the district of prosecution.

Thus, even under the venue analysis adopted by the Ninth Circuit in *Pace*, petitioner's claim would fail. The absence of any specific reference in the wire fraud count to false advertising as a means of executing the scheme was at most a technical defect that would not have prevented the jury from finding that venue was proper in the district of prosecution. See p. 6, *supra*

(quoting jury instructions on venue). Because the outcome would be the same under the approach taken by the Ninth Circuit, this case presents an unsuitable vehicle for resolving the analytical disagreement between the courts of appeals about permissible venue in federal wire fraud prosecutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 01-CR-30006-DRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

ARTHUR M. HAWKINS, ALAN E. GAUTHIER, AND DOUGLAS N. PEARSON, DEFENDANTS

[Filed Nov. 7, 2001]

MEMORANDUM AND ORDER

HERNDON, District Judge

I. Introduction and Background

On January 19, 2001, the Grand Jury returned the initial Indictment in this matter (Doc. 1). That same day, Magistrate Judge Clifford J. Proud ordered that indictment sealed (Doc. 4). On March 22, 2001, the Grand Jury returned a sealed Superseding Indictment (Doc. 9). The Court unsealed the Superseding Indictment on March 23, 2001 (Doc. 11). Subsequently, the Grand Jury returned a Second Superseding Indictment (Doc. 73). The Second Superseding Indictment contains two counts against Arthur M. Hawkins, Alan E.

Gauthier and Douglas N. Pearson. Count One charges Defendants with conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 and Count Two charges Defendants with wire fraud in violation of 18 U.S.C. § 1343. Specifically, Defendants are charged with participating in a scheme to defraud and defrauding consumers in connection with the distribution, sale and marketing of automotive batteries.

Now before the Court are Defendants' motion to change venue (Doc. 41-1); Defendants' motion to dismiss the superseding indictment as time barred and based on duplicity (Doc. 41-4) and Defendants' supplemental motion to dismiss Second Superseding Indictment as containing a third independent theory which is duplicitous (Doc. 79). The Government objects to Defendants' motions. Based on the pleadings and the applicable law, the Court denies Defendants' motions.

II. Motion to Transfer

Trials must be held in the state and district in which the offense was committed. See U.S. Const. art. III, § 2, cl. 3; FED.R.CRIM.P. 18. For crimes that occur in more than one state or district, venue is constitutionally and statutorily proper in any district in which part of the crime was committed. See 18 U.S.C. § 3237(a); *United States v. Tingle*, 183 F.3d at 719, 726 (7th Cir. 1999). Thus, the traditional rule is that a conspiracy charge may be tried in any district in which an overt act of the conspiracy occurred. See *United States v. Rodriguez*, 67 F.3d 1312, 1318 (7th Cir. 1995); *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985) ("As long as one overt act in furtherance of the conspiracy is committed in a district, venue is proper there.").

"[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proven to have been done." *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1244 (1999). "Proper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act in furtherance of the conspiracy is intended to have an effect in the district where the case is finally brought, venue is proper." *United States v. Brown*, 739 F.2d 1136, 1148 (7th Cir. 1984). The Government need prove facts supporting venue only by a preponderance of evidence. *Id.*

Defendants maintain that venue is not proper in the Southern District of Illinois under either Count One or Count Two.[1] Specifically, Defendants maintain that venue is not proper in Count Two because none of the wire frauds occurred or passed through the Southern District of Illinois; and that venue is not proper in Count One because the overt acts were performed by Sears and or EXIDE, who have not been named as co-conspirators, therefore, the alleged acts cannot be attributable to Defendants. The Court does not agree.

As to Count One, the conspiracy count, the Court finds that the conspiracy occurred, in part, in the Southern District of Illinois. First this Court has continuing jurisdiction over the companion case, *United States v. EXIDE Illinois, et al*; 01-CR-30035-DRH, which arose out of the same set of facts as this case.[2]

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[1] The Court notes that Defendants do not cite to any case law or statutes to support its argument of why venue is not proper under Count Two.

[2] The three defendants in 01-CR-30035-DRH are EXIDE Illinois, Joseph C. Calio and Gary Marks.

The defendants in the companion case have pled guilty to one count of wire fraud and one count of conspiracy to commit wire fraud and sentencing is pending. As to Count Two, the wire fraud count, the Second Superseding Indictment alleges that the wires were used in interstate commerce, including the Southern District of Illinois, to promote the sale of known defective batteries through the use of false advertising. In addition, the audit conducted in the Southern District of Illinois revealed the problem to Sears. Furthermore, the Second Superseding Indictment alleges that illegal payments were made in an effort to influence the independent judgment buyer of the Sears battery, which allowed EXIDE to continue to do business in the Southern District of Illinois.

Applying the "substantial contacts analysis" found in *United States v. Reed*, 773 F.2d 477, 480 (2nd Cir. 1985), the Court finds that venue is proper in this Court as to both Counts One and Two of the Second Superseding Indictment. Based on the pleadings, the situs of the Defendants' acts include causing the delivery and sale of defective batteries by Sears' distribution centers in the Southern District of Illinois and causing specific acts of concealment to facilitate the scheme, including but not limited to false advertising in the Southern District of Illinois. As stated earlier EXIDE, a defendant in a companion case, pled guilty to charges containing allegations of delivering known defective products in the Southern District of Illinois and causing false advertising in this judicial district in furtherance of the unlawful agreement. The Second Superseding Indictment alleges that overt acts in furtherance of the conspiracy took place in this judicial district and numerous alleged acts comprising the scheme to defraud

occurred in the Southern District of Illinois. There need not be a personal "tie" to any of the three Defendants to the Southern District of Illinois. The Court concludes that venue for Counts One and Two is proper in the Southern District of Illinois.

Lastly pursuant to FEDERAL RULE OF CRIMINAL PROCEDURE 21, Defendants move the Court to transfer the case to either the Northern District of Illinois or the Eastern District of Pennsylvania. Rule 21(b) provides that "[f]or the convenience of the parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any of the courts thereof to another district." The decision to transfer a case pursuant to Rule 21(b) is within the sound discretion of the trial judge. See *United States v. Zylstra*, 713 F.3d 1332, 1336 (7th Cir. 1983).

Here, the facts do not compel transfer to another venue. The facts demonstrate that the Defendants, the witnesses, the lawyers and the location of the Governments' evidence are in different locations throughout the country. The crimes charged were committed in the Southern District of Illinois and the Government's evidence is located here. Further, the interests of justice do not mandate transfer and Defendants failed to provide any reason for doing so. Despite the fact that the Court finds Defendants' argument that transfer is necessary in light of the horrific events that occurred on September 11, 2001 compelling, the Court rejects Defendants' argument. One could easily infer that persons traveling to and around the East coast are most at risk. Traveling to or from St. Louis could, as a consequence, be the safest destination point or origination location. The Court does not accept Defendants'

rhetoric in this regard. Thus, the Court denies the motion to transfer venue.

III. Motion to Dismiss based on Duplicity

Defendants maintain that if Sears is an unindicted co-conspirator both Counts One and Two of the indictment are duplicitous and must be dismissed. The Court rejects Defendants' argument.

Duplicity is the "joining of two or more offenses in a single count." *United States v. Marshall*, 75 F.3d 1097, 1111 (7th Cir. 1996). The adverse effects a duplicitous count can have on a defendant include "improper notice of the charges against him, prejudice in the shaping of evidentiary rulings, in sentencing, in limiting review on appeal, in exposure to double jeopardy, and of course the danger that a conviction will result from a less than unanimous verdict as to each separate offense." *Id.*; see also *United States v. Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986).

Duplicity is not always fatal to an indictment, as corrective instructions and other measures can cure any prejudice that might exist. *See, e.g., Kimberlin*, 781 F.2d at 1251. Nonetheless, the court must first determine whether the counts at issue are duplicitous. Duplicity exists if a count contains "more than one distinct and separate offense." *United States v. Berardi*, 675 F.2d 894, 897 (7th Cir. 1982). It does not exist if the count merely charges the "commission of a single offense by different means." *Id.*; *see also United States v. Kramer*, 711 F.2d 789, 797 (7th Cir.), cert. denied, 464 U.S. 962 (1983). FEDERAL RULE OF CRIMINAL PROCEDURE 7(c) specifically permits a count to allege that the offense was committed by "one or more specified means." Rule 7(c) has been inter-

preted to contemplate the joining of two or more acts, each one of which would constitute a violation of the same offense standing alone, without offending the rule against duplicity. *Berardi*, 675 F.2d at 898. While it is often a fine line to draw, a count is not duplicitous where it alleges multiple acts, which independent of each other constitute separate violations of the same statute, if the multiple acts are part of a continuing course of conduct. *Id.*; *see also United States v. Bruce*, 89 F.3d 886, 890 (D.C. Cir. 1996) (involving a bank fraud scheme comprised of several transactions); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987) (involving an ongoing scheme to evade taxes).

A single act or purpose of the conspiracy is alleged herein. Ultimately, consumers were to be deprived of the kind of product they were led to believe they would receive. The allegations suggest that as time went along, person were added to the conspiracy and it was broadened, but remained the same conspiracy. *See United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969) (Agreement may continue for a long period of time and include the performance of many transactions in which new parties join the agreement at any time . . .). The Court finds that the second superseding indictment is not duplicitous. Therefore, the Court denies the motion to dismiss based on duplicity.

Further, Defendants argue that the Second Superseding Indictment should be dismissed because the Government introduces a new and independent conspiracy relating to Hawkins (Doc. 79). Specifically, Defendants maintain that this new conspiracy has a wholly different objective and that it commenced more than two years after the conclusion of the earlier conspiracy.

The Government responds that Defendants misstate the law of conspiracy and the standard for determining whether two separate conspiracies have been charged in the same count and that the Second Superseding Indictment charges only one continuous conspiracy. The Court agrees with the Government.

In *Grunewald v. United States*, 353 U.S. 391 (1957), the Supreme Court held that acts performed after the accomplishment of the primary purpose of the conspiracy that furthered the conspiracy only by disguising its existence generally are not considered part of the conspiracy. Relying on its decisions in *Lutwak v. United States*, 344 U.S. 604 (1953) and *Krulewitch v. United States*, 336 U.S. 440 (1949), the Supreme Court concluded that "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." *Grunewald*, 352 U.S. at 402. Further, the Supreme Court stated that "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces." *Id.* at 402. To hold that later acts of concealment are part of the original conspiracy, the Supreme Court said, "would result in a great widening of the scope of conspiracy

prosecutions, since it would extend the life of a conspiracy indefinitely" and would "wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." *Id.*

However, *Grunewald* did recognize that some acts of concealment can serve as conspiratorial acts and thus constitute part of the original conspiracy. *Grunewald* distinguished "acts of concealment done in furtherance of the main criminal objectives of the conspiracy" —which are considered part of the conspiracy—from "acts of concealment done after these central objectives have been attained, for the purpose of covering up after the crime"—which are not considered part of the conspiracy. *Id.* at 405. The Seventh Circuit has indicated that whether a particular act of concealment constitutes part of the original conspiracy depends on the nature of the conspiracy's objective. In *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995), the Seventh Circuit held that where the conspiracy's objective was never "finally attained," acts of concealment may be considered to be part of the conspiracy. *Id.* at 659. According to the Seventh Circuit, "[a] conspiracy ends when its main criminal objective has been accomplished or abandoned, *i.e.*, 'when the design to commit substantial misconduct ends.'" *Id.* (quoting *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1024 (7th Cir. 1992)). But "'[w]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has been terminated. . . .'" *Id.* at 660 (quoting *United States v. Elwell*, 984 F.2d 1289, 1293 (1st Cir. 1993)).

Here, the conspiracy as charged did not end with the last wire transfer. The Second Superseding Indictment charges that the conspiracy and the continuing success of the conspiracy depended on the ability to continuously conceal the truth about the product from consumers and to prevent shareholders in the marketplace from learning the truth about the quality of the product being supplied by a publicly traded corporation, EXIDE. The Second Superseding Indictment alleges that acts of concealment began before the wire transmissions (i.e., falsifying internal quality assurance reports) and continued as part of the wire transmissions (i.e., falsifying corporate books and records) to conceal the true status of the payments. The Second Superseding indictment also alleges that the later acts of concealment "relate back" to the original decision to defraud. See *United States v. Mackey*, 571 F.2d 376, 384 (7th Cir. 1978). As alleged, the acts of concealment are inextricably interrelated to the functioning of the scheme and the continued exploitation charged in the indictment. Based on these allegations, the Court finds that the Second Superseding Indictment alleges a continuing conspiracy including the acts of concealment and not three separate conspiracies. Thus, the Court denies Defendants' supplemental motion to dismiss Second Superseding Indictment as containing a third independent theory which is duplicitous.

IV. Motion to Dismiss the Superseding Indictment as Time Barred

Next, Defendants argue that superseding indictments are time barred unless they properly relate back

to the January 19, 2001 indictment.[3] The Government responds that the superseding indictments relate back to the timely original indictment. The Court agrees with the Government.

"A superseding indictment that supplants a still-pending original indictment relates back to the original indictment's filing date so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996) (citations omitted).

The Court reviewed the original sealed January 19, 2001 indictment. The Court concludes that the superseding indictments *do* relate back to the original indictment, which was only amended in the manner represented by the Government. Thus, the charges brought against Defendants are not time barred. Neither of these superficial changes amounts to the kind of broadening or amendment that would prevent relation back to an earlier pending indictment. The Second Superseding Indictment contains additional language regarding the Defendants at bar, but Defendants do not claim that the additional language does not relate back. Even so, such a claim would be frivolous as it clearly relates back and simply provides more details. Thus, the Court denies Defendants' motion to dismiss the second superseding indictment as time barred.

VI. Conclusion

Accordingly, the Court DENIES Defendants' motion to change venue (Doc. 41-1); Defendants' motion to dismiss Superseding Indictment as time barred and based

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[3] Defendants maintain that the statute of limitations for conspiracy to commit wire fraud and wire fraud are five years.

on duplicity (Doc. 41-4) and Defendants' supplemental motion to dismiss second superseding indictment as containing a third independent theory which is duplicitous (Doc. 79).

IT IS SO ORDERED.

Signed this 7th day of November, 2001.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

(3)

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NO. 03-1326

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

ARTHUR M. HAWKINS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

SUSAN G. JAMES
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MONTGOMERY, AL 36104
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QUESTIONS PRESENTED

The Petitioner herein respectfully moves this Court for an order (1) granting certiorari after its June 21, 2004 denial as this Court's June 24, 2004 decision in *Blakely v. Washington*, 2004 U.S. Lexis 4573, is applicable to the sentencing of petitioner who received a sentence nine and one-half years over that permitted under *Blakely* and/or (2) that this Court remand petitioner's case back to the Seventh Circuit Court of Appeals for a *Blakely* analysis under the record which currently exists.

Questions Presented:

1. Whether application of the *Blakely* v. Washington decision extends to an aggrieved petitioner who's conviction has become final.

(a) Whether Petitioner is entitled to rehearing given that his petition for certiorari was denied 3 days before the release of *Blakely v. Washington*, and as a result did not previously include a *Blakely* issue for this Court's review.

(b) Whether Petitioner is entitled to a remand to the Seventh Circuit Court of Appeals given that he raised *Blakely* related issues below without the benefit of this Court's June 24, 2004 decision.

(c) Whether the Petitioner's sentence exceeds the statutory maximum of 0 to 6 months based on an additional nine and one-half year increase by a judge absent a jury finding of beyond a reasonable doubt on additional facts.

THE PARTIES

The caption in this case contains the name of all parties.

1. THE DECISION IN *BLAKELY V. WASHINGTON*

Pursuant to Rule 44 this Petition for Certiorari is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

On June 21, 2004 Petitioner's Writ of Certiorari was denied on the venue issue raised regarding Circuit splits. The venue issue was raised in this Court because of the existing law in support and in conflict.

Petitioner's *Blakely* argument was omitted because the state of the law pre *Blakely* was that a Judge imposed sentence, nine and one-half years in excess of that authorized, did not violate the Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) because the relevant statutory maximum had not been exceeded.

Petitioner filed a Petition for Certiorari with this Court on March 12, 2004. On May 19, 2004 the United States filed a brief in opposition. On June 1, 2004 the case was distributed for conference on June 17, 2004.

Three days after Hawkins petition was denied on June 21, 2004, this Court rendered the single most important decision regarding punishment since the enactment of the Sentencing Reform Act of 1984. This Court in *Blakely v. Washington* clarified the statutory maximum issue addressed in *Apprendi v. New Jersey* holding "In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the

law makes essential to the punishment", *Bishop*, supra, §87, at 55, and the judge exceeds his proper authority."

Although the majority in *Blakely* did not specifically address the federal sentencing guidelines, one need look no further than the dissents of Justices O'Connor and Breyer to realize *Blakely* is applicable to federal guidelines cases. Plain and simple, any fact that increases the upper limits on the sentencing judges discretion must be charged in the indictment and submitted to the jury for a finding .

Blakely is an intervening circumstance of a substantial or controlling effect. It is clear that Blakely is applicable for cases not yet final. What is less clear is retroactive application of *Blakely* in collateral attacks on sentences. Attempts by defendants to collaterally attack sentences pursuant to this Court's holding in *Apprendi* met with virtually no success since this Court did not address the issue of retroactivity. The same arguments are anticipated in response to *Blakely* collateral attack petitions. Dependent upon this Court's action on Petitioner's rehearing his conviction may be deemed by the lower court to be final thereby barring *Blakely* relief. There are countless defendants in custody whose sentences were imposed in violation of *Blakely* that will be denied relief absent a ruling from this Court on the retroactive application of *Blakely*.

In other words in this case warranted relief for Arthur Hawkins consistent with *Blakely* may be denied because his petition for certiorari was denied three days before *Blakely* was released.

The interests of justice require the requested relief herein as the interest in finality of litigation must yield where the interests of

justice would make unfair the strict application of the rules. *United States v. Ohio Power Company* , 353 U.S. 98, 99 (1957). This Court has previously recognized that a new controlling Supreme Court decision presents an intervening circumstance justifying the grant of a rehearing. See *Zap v. United States*, 330 U. S. 800 (1947); *Bradley Mining Co., v. Boice*, 345 U. S. 932 (1953); *West v. Northwest Airlines, Inc.*, 505 U.S. 1201 (1992); and *Friend v. United States*, 517 U. S. 1152 (1996).

2. THE SENTENCE IS THE TAIL WHICH WAGS THE DOG.

Petitioner's ten year sentence was imposed based on 26 levels of sentencing factors that were not charged in the indictment or decided by a jury of his peers beyond a reasonable doubt.

Specifically, Petitioner was convicted in a jury trial of two counts of wire fraud resulting in exposure to a ten year term. The indictment made no reference to the enhancements nor did the jury verdict include any findings, reasonable doubt or otherwise, as to this aggregate 26 level sentencing enhancement increase. If Petitioner were sentenced today under the same facts the aggregate 26 level sentencing enhancements would be barred under *Blakely*. If Petitioner's case were still at the Seventh Circuit Court of Appeals the aggregate 26 level sentencing enhancements would be prohibited based on the omissions in his indictment and general verdict form. See *United States v. Booker*, 03-4225, 2004 U.S. App. LEXIS 14223 (July 9, 2004). Petitioner should find himself in no worse position today. *Blakely* was not available to him at sentencing, on appeal, or the original petition for certiorari. He did, however, object to the enhancements below.

Petitioner was convicted of two Counts under 18 U.S.C. §1343 and 1346. Under the United States Sentencing Guidelines (hereafter U.S.S.G.) the base offense level was level 6, Criminal History Score of I, and guidelines of 0 to 6 months. However, at sentencing the District Judge, in reliance on a presentence report prepared by a probation officer made preponderance findings on the following thereby increasing Petitioner's base offense 26 levels from a level 6 to a level 32.

Petitioner's sentence is clearly illegal based on the holding in *Blakely*. The following is an outline of the Judge imposed sentencing factors that resulted in the nine and one-half year increase from the original base level of 6 and guidelines of 0 to 6 months.

U.S.S.G. §2F1.1(b)(1((M)	_____+	12
U.S.S.G. §2F1.1(b)(2)(A)	_____+	2
U.S.S.G. §2F1.1(b)(3)	_____+	2
U.S.S.G. §2F1.1(b)(5)(C)	_____+	2
U.S.S.G. §3B1.1(a)	_____+	4
U.S.S.G. §3B1.3	_____+	2
U.S.S.G. §3C1.1	_____+	2

The nine and one-half year increase in Petitioner's punishment is in contravention of this Courts holding in *Blakely*. The nine and one-half years was added based on a probation officers opinion with input from the United States Attorney and decided by a Judge based on a preponderance of the evidence.

This Court's holding in *Blakely* held that "Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The

Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours." 4 Blackstone, Commentaries on the Laws of England, 343 (1769)." This proposition is of no less import to Petitioner.

This Court's explanation of the reason the Framers of the Constitution put a jury trial guarantee in the constitution was their unwillingness to trust the Government. Surely a case which takes a six month sentence to a 10 year sentence is one that should be decided by a jury.

As noted by this Court in *Blakely*, *Apprendi* critics would favor the "tail which wags the dog" notion espoused by this Court in *McMillian v. Pennsylvania*, 477 U.S. 79 (1986). In other words a sentence should not go too far otherwise exceeding the judicial estimation of the proper role of the Judge. Even under this analysis, objective scrutiny reveals that Petitioner's nine and one half year increase is clearly the tail which wags the dog.

It is clear that Petitioner's claim is valid. The question is what remedy should be granted. The matter could be remanded to the Seventh Circuit or decided in this Court. If this Court is disinclined to grant either remedy, this may well be the case where this Court decides the issue of retroactivity of *Blakely* and its predecessor *Apprendi*.

In support of Petitioner's position he directs the Court to the holding of the Seventh Circuit in *United States v. Booker*, 03-4225, 2004 U.S. App. LEXIS 14223 (July 9, 2004). The *Booker* Court, the same Court that would pass on Petitioner's sentence challenge, agree with the four dissenting justices in *Blakely* that

Blakely dooms the guidelines in so far as they require that sentences be based on facts found by a Judge. In noting limitations on sentencing judges, per *Blakely*, the Seventh Circuit stated "All it cannot do under *Blakely* is take away from the defendant the right to demand that the [quantity] be determined by the jury rather than by the Judge, and on the basis of proof beyond a reasonable doubt (Opinion, page 4).

This principle should be no less applicable in a case such as Petitioner's wherein monetary losses and numerous other sentencing factors were determined by a Judge and not a jury beyond a reasonable doubt.

It is clear if Petitioner's case were remanded to the Seventh Circuit, his sentence would necessarily be reduced at least nine and one-half years pursuant to *Blakely* and *Booker*.

Additionally, subsequent to the release of *Booker* in the Seventh Circuit on July 9, 2004 wherein the Court held the Sentencing Guidelines unconstitutional, the Fifth Circuit in *United States v. Pineiro*, 03-3043, 2004 U.S. App. LEXIS 14259 (July 12, 2004) ruled to the contrary which now creates a split in the Circuits on this issue.

If Petitioner's conviction is deemed final by this Court's denial of certiorari on June 21, 2004, three days before the release of *Blakely* on June 24, 2004 and retroactive application of *Blakely* is foreclosed on collateral review, Petitioner like many other federal prisoners will be required to serve an excessive sentence in violation of his right to a jury trial and in contravention of this Courts holdings in *Blakely and Apprendi*. Such an unjust result is precisely what the Framers of our constitution sought to avoid by ensuring that the Judges authority to sentence derives wholly from the jury's verdict.

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment.

/s/Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins

CERTIFICATE OF COUNSEL

As Counsel for Petitioner, I hereby certify that the Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

/s/Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins